

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 456 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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HEIRS OF BRUHASPATI HIRABHAI

Versus

AMARSING LALJIBHAI

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Appearance:

MR NV ANJARIA for Petitioners  
MR AVINASH K MANKAD for Respondent No. 1  
NOTICE SERVED for Respondent No. 2

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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 8/5/98

CAV JUDGEMENT

#. This second appeal has been filed by the defendants No.2 & 3.

#. The brief facts giving rise to this appeal are as under :-

The disputed property No.774 situated in Surat was joint and ancestral property which stood in the name of plaintiff's grandfather Fakirbhai Narsinhbhai. He had three sons, viz (1) Laljibhai (2) Hirabhai and (3) Vishrambhai. After the death of Fakirbhai, the suit property was mutated in the names of Hirabhai Fakirbhai and Vishrambhai Fakirbhai. The plaintiff claimed 1/3 share in the disputed property. He served a notice upon the defendant No.3 demanding partition but evasive reply was given by the defendant No.3. He denied the share of the plaintiff in the suit property, consequently the plaintiff filed suit for partition claiming his 1/3 share in the joint property.

#. The defendant No.1 in his written statement pleaded that he never refused partition of the suit property and he has no objection to the partition. By getting written statement amended, it was pleaded by him that the sale deed dated 26-3-1928 executed by him in favour of his father was sham transaction and it was executed with a view to save the property from attachment which may be sought by the creditors.

#. The defendant No.3 in his written statement contested the suit on grounds of limitation, non joinder of necessary parties and also pleaded that the plaintiff has no share. It was also pleaded that the defendant No.1 and plaintiff's father separated during the life time of Fakirbhai Narsinhbhai and that there was private partition also.

#. The trial court decreed the suit declaring that the plaintiff has 1/3 share, whereas the defendant No.1 has also 1/3 share and the defendants No.2 & 3 have jointly 1/3 share in the property. Decree for partition was granted in these terms.

#. An appeal was preferred which was dismissed. It is therefore this second appeal.

#. The following substantial questions of law were formulated in this appeal.

(1) Whether in the facts and circumstances of the instant case both the Lower Court erred in not properly construing relevant provisions of Hindu Law and in holding that the suit property was ancestral one and the plaintiff had 1/3 share in the same and in passing the preliminary decree in the instant case ?

(2) Whether the Lower Courts erred in law in allowing the amendment application of defendant No. 1 and in raising additional issues at 6A and 6B ?

(3) Whether the Lower Courts erred in law holding that the documents exhibit 88 executed by defendant No.1 was formal in nature, without consideration and was never acted upon and that document exhibit 88 was not at all properly construed ?

(4) Whether on the basis or principles of Estoppel the Lower Courts erred in not holding that the defendant No.1 could not be permitted to take advantage of his own wrong as exhibit 88 according to him was executed by him to defraud the creditors ?

#. The learned counsel for the parties were heard at length. Coming to the second substantial question of law, I don't feel that this question of law needs any answer in this second appeal. One of the contentions of the appellants counsel has been that the amendment application moved by the defendant No.1 seeking amendment in his written statement was wrongly allowed and consequently additional issues were also wrongly framed. This matter could be agitated by filing a revision against the order granting amendment in the written statement of the defendant No.1 and not in this second appeal. If amendment was granted in the written statement of the defendant No.1, naturally consequential additional issues arising out of such amended written statement were bound to be framed by the trial court. It appears that no illegality was committed by the trial court in granting the amendment and in framing additional issues. Incidentally, it may be observed that the amended pleadings was that the sale deed Ex.88, was a nominal transaction which was without consideration between father and son and it was never acted upon. Such facts could be pleaded at a later stage during trial and no jurisdictional error was committed by the trial court in granting such amendment. Likewise, it committed no error of law in framing additional issues arising of such additional facts pleaded in the amended written statement. Thus in the first place, this question does not arise and in the second appeal in any event, for the reasons stated above, this question is answered in negative.

#. Substantial questions No.1,3 & 4 are

interconnected hence they are dealt with together. The main grievance of the appellants Counsel has been that the courts below committed an error in holding that the sale deed Ex.88 executed by the defendant No.1 was formal in nature without consideration and was never acted upon and that it was not properly construed. It was further contended that if this document could have been properly construed, upon execution of sale deed Ex.88, the defendant No.1 lost this share in the joint property and as such his share could not be declared to be 1/3 rd. So far as the plaintiff's share is concerned, it was argued that on account of private partition, the plaintiff also has no share because he had separated along with his father during the life time of deceased grandfather. The determination of share in the joint property by the two courts below was also assailed in the course of arguments.

##. Having gone through the judgements of the two courts below, I find that it is case of concurrent finding of fact on the plea that there was earlier private partition and this concurrent finding is the result of proper appreciation of evidence on record. The lower appellate court has observed that no cogent and reliable evidence on private partition has been adduced by the defendants No.2 & 3. Consequently, private partition set up by them was disbelieved. The High Court in Second Appeal cannot lightly reverse such finding of fact which was recorded by the courts below upon proper scrutiny and appreciation of evidence on record. Thus on this ground, the share of the plaintiff in the joint property cannot be negatived and ousted. Likewise the share of the defendant No. 1 cannot be excluded on this imaginary ground.

##. The lower appellate court again after proper appreciation of evidence on record came to the conclusion that the suit property was not purchased from the money contributed by the defendants No.2 & 3 and their father Hirabhai. This finding is also hardly vitiated by any error of appreciation of evidence on record. Infirmities in case set up by the defendants No.2 & 3 were considered by the lower appellate court and changing stand taken by them was also taken into account. In these circumstances, the finding recorded by the lower appellate court that the property was not purchased by the defendants No.2 & 3 and their father is correct finding of fact which requires no interference.

##. The finding of the two courts below that the disputed property is joint family property, also does not

require any interference. It is a finding of fact recorded after due consideration of the evidence on record.

##. Coming to the main question, namely misconstruction of sale deed Ex.88, executed by the defendant No.1 on 26th March, 1928 in favour of his father, I feel that this sale deed was not improperly construed or considered by the two courts below. Two courts below were of the opinion that it was a nominal document. I fail to understand the word nominal document in such matters. After considering the material on record, it seems that the case of the defendant No.1 was that it was sham and collusive transaction between him and his father in order to save his share from being attached by the creditors. The trial court as well as the appellate court found that there was no evidence that any creditor of the defendant No.1 was intending to get his share attached in execution of any decree. However, in order to determine whether the sale transaction contained in Ex.88 was a genuine or sham and collusive transaction, certain material events and facts have to be taken into consideration. No doubt it is a registered document but the consideration of the sale deed is unbelievable and unimaginable. It seems that 1/4 share of the defendant No.1 was sold by him to his father. Actually he had 1/3 share in the property and not 1/4 share. Little knowing his extent of share in the property, he executed a sale deed without any necessity and consideration of the sale transaction, is also imaginary. There is no recital that the purchaser was put in joint possession of the share of the defendant No.1. Further, there is no evidence that there was any creditor of the defendant No.1 who was threatening to get his share in the joint property attached. As such, whatsoever may be the background in which Ex.88 was executed but it follows that it was not genuine transaction rather it was sham and collusive transaction between the defendant No.1 and his father. The so-called theory of financing of loan of Rs.2,200/- by the father to his son and consequent upon part payment of Rs. 600/only, the sale deed was executed for Rs.1000/- being his share in the property of the defendant No.1, seems to be unbelievable. It was not a genuine transaction. Consequently from such sale deed, the share of the defendant No.1 in the joint property could not be excluded. The lower appellate court has rightly taken into consideration subsequent conduct of the parties and admission made by the defendants No.2 & 3 in mutation proceedings, after execution of sale deed, wherein, they admitted the share of the defendant No.1. As such, on

the basis of this sale deed, the defendant No.1 could not be deprived of his 1/3 share in the property. The two courts below taking into consideration the entire oral and documentary evidence on record and the circumstances of the case, rightly came to the conclusion that the sale deed was without consideration and it was never acted upon. As such, irresistible inference can be drawn that the sale deed was sham and collusive transaction. On the strength of such sale deed, the defendant No.1 could not be deprived of his share in the joint family property.

##. Coming to the determination of the share, the two courts below have rightly held that the plaintiff has 1/3 share in the property, so also the defendant No.1 and defendants No.2 & 3 have joint 1/3 share in the property, because the defendants No. 2 & 3 are the sons of the deceased Hirabhai Fakirbhai, one of the three sons of Fakirbhai Narsinhbhai. They will jointly inherit 1/3 share of their father Hirabhai Fakirbhai. Thus the two courts below didn't commit any error of law or error in Hindu Law in determining the share of the parties. Likewise, they didn't commit any error of law or illegality that the sale deed Ex.88 was a sham and collusive document which was without consideration and which was never acted upon.

##. The fourth question is that on the alleged ground of principle of estoppel, the defendant No.1 could not be permitted to claim his share in the joint property because he came out with belated case that he executed sale deed Ex.88 as collusive document to defraud his creditors. Since it was not established from the evidence on record that there were any creditor of the defendant No.1, it cannot be said that his act of execution of sale deed Ex.88 was fraudulent with a view to defeat the interest of creditors. Principle of estoppel in these circumstances cannot be applied to the facts and circumstances of the case. Thus these questions are answered accordingly.

##. In the result, I don't find any cogent ground for interference in this second appeal. The appeal being without merit is liable to fail. It is accordingly dismissed. In these circumstances of the case, the parties shall bear their own costs.

Dt : 8/5/1998 ( D.C.Srivastava, J )

(KPP)